

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed: January 17, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mark Beveridge

Serial No. 90647376

Richard S. Ross, Esq.
for Mark Beveridge.

Nelson Snyder, Trademark Examining Attorney, Law Office 107,
Leslie Bishop, Managing Attorney.

Before Cataldo, Coggins, and Elgin,
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Mark Beveridge (“Applicant”) seeks registration on the Principal Register of the
mark CUESZ (in standard characters) for the following services, as amended:

Real time personal fitness training services including
performance, nutritional, medical restorative and
mindfulness personal fitness training and further

including conditioning and recovery strategies therefor to individual clients in International Class 41.¹

The Examining Attorney refused registration of the subject mark under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that it is merely descriptive of the identified services.² In response to the refusal, Applicant represented: “The Applicant has no intention to provide prompting or reminders from the instructor/trainer, now or in the future. The Applicant’s intention is to provide physical fitness training services to clients to improve their athletic abilities.”³ Thereafter, the Examining Attorney issued a refusal under Section 2(e)(1) on the ground that the subject mark is deceptively misdescriptive of Applicant’s services and maintained the ground of mere descriptiveness as an alternative ground for refusal.⁴

When the alternative refusals were made final, Applicant requested reconsideration. After the Examining Attorney issued a subsequent final office action, Applicant again requested reconsideration.⁵ The Examining Attorney denied the

¹ Application Serial No. 90647376 was filed on April 15, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

² Dec. 14, 2021 Office Action at TSDR 4-5. The concurrently issued refusal under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), was later withdrawn based on cancellation of the cited mark. Feb. 5, 2022 Office Action at TSDR 3.

Citations to the prosecution record refer to the downloadable .pdf version of the TSDR system. *See In re Integra Biosciences Corp.*, 2022 USPQ2d 93, at *7 (TTAB 2022). Citations to the briefs in the appeal record refer to the Board’s TTABVUE docket system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020).

³ Jan. 7, 2022 Response to Office Action at TSDR 1.

⁴ Feb. 5, 2022 Office Action at TSDR 1.

⁵ Dec. 9, 2022 Subsequent Final Office Action; March 1, 2023 Request for Reconsideration.

second request for reconsideration in part as to the alternative refusals;⁶ Applicant then appealed to the Board. The appeal is fully briefed.⁷

We affirm the refusal to register on the basis of deceptive misdescriptiveness, and do not reach the alternative refusal based on mere descriptiveness.

I. Deceptive Misdescriptiveness Applicable Law

Trademark Act Section 2(e)(1) prohibits registration on the Principal Register of designations that are deceptively misdescriptive of the goods or services to which they are applied, absent a showing of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).⁸ *See, e.g., In re Hinton*, 116 USPQ2d 1051, 1051-52 (TTAB 2015) (finding “THCTea” deceptively misdescriptive of “tea-based beverages” not containing THC); *In re Shniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006) (finding “SEPTEMBER 11, 2001” deceptively misdescriptive of history books and entertainment services not pertaining to the events of September 11, 2001).

A term is considered deceptively misdescriptive if (1) the term misdescribes a quality, feature, function, or characteristic of the goods or services with which it is used; and (2) consumers would be likely to believe the misrepresentation. *In re Dolce Vita Footwear, Inc.*, 2021 USPQ2d 479, at *9 (TTAB 2021) (citations omitted); *Hinton*, 116 USPQ2d at 1052.

⁶ Apr. 3, 2023 Denial of Request for Reconsideration.

⁷ Applicant’s Brief and operative Reply Brief are at 6 TTABVUE and 11 TTABVUE, respectively. The Examining Attorney’s Brief is at 8 TTABVUE. We have given no consideration to Applicant’s original Reply Brief, at 9 TTABVUE, which exceeded the page limitation.

⁸ Applicant does not seek registration under Trademark Act Section 2(f).

II. Discussion

A. Does the Proposed Mark Misdescribe the Identified Services?

“As to the first part of the test, a mark is misdescriptive when it is merely descriptive, rather than suggestive, of a significant aspect of the [services] . . . which the [services] . . . plausibly possess but in fact do not.” *Dolce Vita Footwear*, 2021 USPQ2d 479, at *9 (citing *Hinton*, 116 USPQ2d at 1052); *In re Phillips-Van Heusen*, 63 USPQ2d 1047, 1051 (TTAB 2005)).

The test to determine whether a mark is merely descriptive is whether it immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *See, e.g., In re Chamber of Com. of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) ((quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (quoting *Est. of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 543 (1920) (“A mark is merely descriptive if it ‘consist[s] merely of words descriptive of the qualities, ingredients or characteristics of the goods or services related to the mark.’”)). A mark need not immediately convey an idea of each and every specific feature of the goods or services in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods or services. *Chamber of Com.*, 102 USPQ2d at 1219 (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346 (Fed. Cir. 2001)); *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982) (citing *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973)).

The determination of whether a mark is merely descriptive must be made in relation to the goods or services for which registration is sought. *Chamber of Com.*, 102 USPQ2d at 1219. In other words, we ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1252, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)).

We consider whether the mark CUESZ is merely descriptive of at least one service listed in the class. *In re Analog Devices, Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff'd*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989) (“[I]t is a well settled legal principle that where a mark may be merely descriptive of one or more items of goods [or services] in an application but may be suggestive or even arbitrary as applied to other items, registration is properly refused if the subject matter for registration is descriptive of any of the goods [or services] for which registration is sought.” (citations omitted)).⁹

A novel or misspelling of a word will not turn a descriptive word into a non-descriptive mark. *See, e.g., In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (holding QUIK-PRINT, the phonetic spelling of “quick print,” merely descriptive of printing and photocopying services because “[t]here is no

⁹ Thus, Applicant’s argument that the Examining Attorney did not make any evidence of record showing that CUESZ (cues) describes Applicant’s other services, namely “performance, nutritional, medical restorative or mindfulness fitness training,” 6 TTABVUE 11, is immaterial to our analysis.

legally significant difference here between “quik” and “quick.”); *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355, 358 (CCPA 1953) (holding FASTIE, phonetic spelling of “fast tie,” merely descriptive of tube sealing machines); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1164-65 (TTAB 2017) (holding SHARPIN, the phonetic equivalent of “sharpen,” merely descriptive of knife blocks with built-in sharpeners). Here, Applicant does not dispute the Examining Attorney’s contention that the subject mark CUESZ is a deliberate misspelling of the word “cues.”

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *In re Fallon*, 2020 USPQ2d 11249, at *7 (TTAB 2020) (quoting *Real Foods*, 128 USPQ2d at 1374). “These sources may include [w]ebsites, publications and use in labels, packages, or in advertising materials directed to the goods [or services].” *Id.* at *7-8 (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (internal quotation omitted)). “Evidence that a term is merely descriptive similarly may come from an applicant’s own usage other than that found on its labels, packaging or advertising materials.” *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *4 (TTAB 2019).

To show that CUESZ (i.e., a novel or misspelling and aural equivalent of “cues”) merely describes a significant aspect that Applicant’s identified services could plausibly possess, the Examining Attorney submitted dictionary definitions of

“fitness” as “the state of being physically healthy or strong”¹⁰ and “conditioning” as “the process of training that results in physical fitness.”¹¹ He also relied on online articles regarding the role of a fitness trainer in helping clients achieve physical fitness.¹² Finally, the Examining Attorney pointed to the promotional video made of record by Applicant which uses Applicant’s subject mark in the advertising of Applicant’s identified services, pronounces the marks as the word “cues,” and shows individuals participating in various fitness activities.¹³ Based on this evidence, the Examining Attorney argued the plain language meaning of Applicant’s services “real time personal fitness training services including . . . conditioning . . . strategies therefor to individual clients” encompasses physical fitness training and instruction for such clients.¹⁴

Indeed, Applicant’s evidence of record confirms that the full scope of the recited services includes physical fitness training. First, a printed brochure states that Applicant provides “precision-based approach to optimizing your fitness performance” featuring evaluations, blood tests, customized coaching through virtual

¹⁰ August 24, 2022 Final Office Action at TSDR 4-5, from MACMILLAN DICTIONARY (macmillandictionary.com).

¹¹ *Id.* at TSDR 8, from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (ahdictionary.com).

¹² Aug. 24, 2022 Office Action at TSDR 10-17.

¹³ Dec. 9, 2022 Subsequent Final Office Action at TSDR 6-24 (screenshots from Applicant’s video).

¹⁴ 8 TTABVUE 5-6.

training sessions, nutrition consultations, and customized performance, mindful, and other consultations.¹⁵ Second, a promotional video describes Applicant's services as

a custom human fitness program, including four disciplines comprising performance, nutritional, medical restorative, and mindfulness fitness training, resulting in a well-rounded fitness program tailored to individual clients. As a member, you'll be assigned a team of world-class fitness professionals, including medical professionals, all of whom will work cohesively for and with you. We remove the guesswork and provide a precision-based approach to optimizing fitness health. After we conduct a personal interview with you to learn your lifestyle, habits, and goals, we craft a personalized program to help you achieve those goals. CUESZ – providing a multidisciplinary custom human fitness program designed just for you to optimize your overall personal fitness health.¹⁶

We turn next to the evidence of descriptiveness of “cues” in relation to these services. The Examining Attorney made of record dictionary definitions of “cue” as “A reminder or prompting” or “A hint or suggestion.”¹⁷ He argued that “cues” or “cueing” is a feature of various types of physical fitness training, based on various online articles and blog posts, some directed to consumers and some to professionals, including those listed below (emphasis added):

Cueing is a vital skill that every fitness professional should master. It is essential for coaching proper technique, and it creates a connection between you and your client, conveying how in tune you are to their

¹⁵ July 26, 2022 Response to Office Action at TSDR 2.

¹⁶ See Nov. 9, 2022 Request for Reconsideration (video file). We have transcribed the video.

¹⁷ Dec. 14, 2021 Office Action at TSDR 58-60, from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (ahdictionary.com).

movement and performance . . . Here are five tips to improve your **cues**.¹⁸

Square your hips. Tuck your tailbone. Zip your navel to your spine. Listening to your trainers is much like playing a game of “Simon Says.” But if you’re new to exercise or trying a workout for the first time, it’s not uncommon to get tangled in a trainer’s **cues** . . . Trainer **cues** . . . create awareness to movement . . . these prompts are intended to help you get the most out of your workout and prevent injury. Read on to learn the most common trainer cues and how to decode them.¹⁹

The top ten corrective exercise **cues** that we give daily, while not exhaustive because there are dozens of cues for every exercise, are essential for just about every exercise possible.²⁰

A trainer can offer **cues** to help you get your body into the right position to ensure you are doing each move correctly (and safely).²¹

Cueing for Different Learning Styles . . . Raising the arm or pointing to the foot are examples of visual **cueing** . . . The instructor is still required to explain what is expected of the participant while the visual cue is being given . . . It is advisable that the instructor **cues** the ‘move’ first . . . it’s also called tactile or physical **cueing** and is used to teach proper movement patterns, as it trains their kinesthetic awareness. This is more often used in personal training²²

Modifications and alignment **cues** for the [yoga] poses will be provided throughout²³

¹⁸ *Id.* at 72, from National Academy of Sports Medicine (nasm.org).

¹⁹ *Id.* at 61-62, from Daily Burn (dailyburn.com).

²⁰ *Id.* at 65, from Mountain Life Fitness (mtnlifefitness.com).

²¹ Feb. 5, 2022 Office Action at TSDR 15, from Verywell (verywellfit.com).

²² *Id.* at TSDR 26-28, from NESTA (nestacertified.com).

²³ *Id.* at TSDR 42, from Northern Michigan University (nmu.edu).

Your coach analyzes your results and communicates coaching **cues** and advice [remotely].²⁴

7 Most Effective Personal Training **Cues** to Improve Client Movement . . . One of the aspects of “personal trainer language” aimed at modifying your client’s position, muscle activation, or movement is body **cues** . . . The four main reasons personal trainers use **cues** are to: Prevent injury, Activate key muscles, Improve position, Make the most of an exercise . . . In this article, we list some of the most common and effective movement **cues** and suggest when to use them with your clients.²⁵

Get Stronger Now with These Powerful Weightlifting **Cues** . . . A weightlifting **cue** is a simple reminder, usually in the form of a phrase, that directs your attention to a particular aspect of your exercise technique . . . **Cues** like this may seem obvious, trivial, or boring, but when used properly they can immediately boost your strength, fix seemingly intractable problems with your technique, and significantly reduce your risk of injury.²⁶

Thus, the Examining Attorney argued, “the mark’s sole term (properly spelled as CUES) identifies a characteristic or feature of the identified services, namely, that they involve ‘reminder[s], prompting, hint[s], or suggestion[s]’ from the trainer/instructor.”²⁷ We find the evidence makes a prima facie case that “cues” is merely descriptive of an aspect of Applicant’s physical fitness training services.

On the other hand, we find Applicant’s arguments and supporting evidence traversing the refusal unpersuasive. Applicant argued the definition of “cue” has

²⁴ *Id.* at TSDR 51, from Crafted Coaching (crafted.coach).

²⁵ *Id.* at TSDR 57-58, from AFPA (afpafitness.com).

²⁶ *Id.* at TSDR 66-69, from Legion (legionathletics.com).

²⁷ 8 TTABVUE 6.

multiple meanings that do not describe the services at issue.²⁸ However, “[I]t is well settled that so long as any one of the meanings of a term is descriptive . . . the term may be considered to be merely descriptive” *Dolce Vita Footwear*, 2021 USPQ2d 478, at *13-14 (quoting *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018)).

We also do not find convincing Applicant’s argument that the USPTO does not view the term “cues” in educational contexts as descriptive. Applicant made of record various online articles utilizing the term “cues” in connection with instruction in various settings, such as the following (bolded for emphasis):

A teacher’s overall instructional effectiveness depends heavily on how that teacher uses instructional **cues**. A **cue** consists of a word, phrase, or sentence that describes a particular aspect of a concept or skill. While **cues** most often focus on motor skills development in physical education, they may also target fitness, strategy, character development, or any other aspect of lessons teachers deem appropriate.²⁹

Using **cues** is one of many effective classroom management techniques. To initiate directions or signal for students to shift their focus from one state of attention to 100% attention, it is necessary to use some attention **cues**. We can use any word, signal, or sound to signify that we need our students to be 100% attentive. However, over time, the **cue** comes to represent all that is involved within the expectation, related to what it means to demonstrate quality attention, and to take on the demeanor of a participant within a culture of listening.³⁰

²⁸ 6 TTABVUE 11 and n.3.

²⁹ Nov. 9, 2022 Request for Reconsideration at TSDR 25.

³⁰ *Id.* at TSDR 28.

Nonverbal **cues** are used to communicate with and ultimately educate students with disabilities.³¹

Below are helpful **cues** teachers can share with children, so they are more successful at completing the skills that comprise the PE Central Skills Challenge.³²

I wrote recently, that good coaches, and managers also believe in the power of purposeful language. **They use basic cues to reinforce their standards**. Cues are short, meaning-rich words that convey meaning while imposing simplicity.³³

Against this background, Applicant also made of record the TESS records for five live registrations without disclaimers of the formative term “cue”:

Reg. No. 3754186 for CUE for “Educational publications, namely, books, [] in the field of human resources”;

Reg. No. 5113596 for CUE and design for “Educational services, namely, providing training to educators in the use of technology to advance student learning”;

Reg. No. 5862496 for CUE for “Energy brokerage services; Brokerage of energy, namely, gas and electricity; Consultancy concerning financing of energy projects; Electronic payment services by which utility customers may apply money from various sources for payment of energy costs”;

Reg. No. 4843936 for CUES for “consulting in the field of maintenance and repair of utility and industrial pipelines”; and

Reg. No. 783373 for CUES for “services rendered to credit union organizations and their managing personnel in such

³¹ *Id.* at 32.

³² *Id.* at 36.

³³ *Id.* at 39 (emphasis in original).

areas as research, promotion, management, and public relations.”³⁴

These registrations are for goods and services far afield of Applicant’s physical fitness training services and have little probative value as to the meaning of “cue” as applied to these services. In any event, prior decisions and actions of other trademark examining attorneys in registering other marks or approving marks for registration have little evidentiary value and are not binding upon the USPTO or the Board. *See In re Cordua Rest. Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (existence of a registration for a standard character mark does not preclude a finding that the stylized form of the same mark is generic) (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”)). Each case is decided on its own facts, and each mark stands on its own merits. *See In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each

³⁴ *Id.* at TSDR 10-20. Applicant also made of record six cancelled registrations. A cancelled registration generally is evidence only of the fact that that registration issued, and therefore is not evidence that a mark is not descriptive. *Cf. Bond v. Taylor*, 119 USPQ2d 1049, 1054-55 (TTAB 2016) (cancelled registration does not establish that mark is weak); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011) (“[D]ead’ or cancelled registrations have no probative value at all”). Thus, we accord the cancelled registrations submitted by Applicant little, if any, probative value. In addition, Applicant submitted two live registrations that we find even less relevant than those listed above because they bear no similarity to Applicant’s services, even broadly interpreted. *See* Nov. 9, 2022 Request for Reconsideration at 21, 24 (Reg. Nos. 5951803 (“Downloadable mobile applications for personal calendar management”) and 4576610 (“pagers”)).

application must be considered on its own merits.”); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009).

Applicant also contended that we should find the mark CUESZ to be suggestive because it requires “some imagination, thought, and perception are required to arrive at the qualities or characteristics of the [services]”³⁵ See *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978) (discussing analysis of descriptive versus suggestive marks). We find that the unrebutted evidence submitted by the Examining Attorney shows that the relevant public will immediately understand the term CUESZ to refer to a feature or characteristic of Applicant’s recited physical fitness training services. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987) (the burden of coming forward with evidence in support of the applicant’s argument of suggestiveness was upon the applicant). In particular, the evidence demonstrates that no imaginative step is required for consumers to understand CUESZ (i.e., “cues”) as a feature of “Real time personal fitness training services including performance . . . and further including conditioning . . . strategies therefor to individual clients.”

In view of the evidence of record as a whole, we find it plausible that that physical fitness training services could feature cues, rendering the mark CUESZ merely descriptive for Applicant’s “real time personal fitness training services including . . . conditioning . . . strategies therefor to individual clients.” Because Applicant

³⁵ 6 TTABVUE 9.

represents that his training services do not involve cues,³⁶ the misspelled term CUESZ misdescribes Applicant's services under the first factor of the test. *See Hinton*, 116 USPQ2d 1053 (where applicant admitted its beverages did not include THC, mark THCTea misdescribes the goods).

B. Would Consumers Likely Believe the Misrepresentation?

For the second prong of the test under Section 2(e)(1), “[t]he Board [applies] the reasonably prudent consumer test in assessing whether a proposed mark determined to be misdescriptive involves a misrepresentation consumers would be likely to believe.” *Id.* at 1052 (citing *R.J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 179 (TTAB 1985)); *accord*, *Dolce Vita Footwear*, 2021 USPQ2d 479, at *9-10. The Examining Attorney contended the articles and blog posts discussed above also demonstrate that consumers would believe the misrepresentation because they show that “personal fitness training and conditioning services commonly involve reminders, prompting, hints, or suggestions from the instructor/trainer.”³⁷ Applicant did not address this factor of the test.

The uncontroverted evidence of record demonstrates that consumers are accustomed to encountering cues in personal fitness training and conditioning. It is likely, therefore, that the reasonably prudent consumer (i.e., someone who receives personal fitness training services) would believe that Applicant's services, promoted

³⁶ Applicant does not address in this appeal his representation during prosecution that his services will not involve providing prompting or reminders from the fitness instructor/trainer.

³⁷ *Id.* at 7-8.

under the proposed CUESZ mark, would feature corrective exercise cues. The second part of the test is satisfied.

III. Conclusion

Having reviewed the evidence of record, we find that both parts of the deceptive misdescriptive test have been satisfied. Accordingly, we find Applicant's proposed mark to be deceptively misdescriptive of the identified services within the meaning of Trademark Act Section 2(e)(1).

Because we affirm the refusal on this basis, we do not reach the alternative basis of refusal asserted by the Examining Attorney, i.e., that the mark is merely descriptive under Section 2(e)(1).

Decision: The refusal to register Applicant's proposed mark CUESZ on the ground that it is deceptively misdescriptive under Trademark Act Section 2(e)(1) is **affirmed.**